



ATTACHMENT A Remarks

This application now includes claims 26-46, 48-98, 101-115 and 119-130. The original 15 independent claims remain, some having been amended. New independent claim 119 with its dependent claims 120-125 and new independent claim 126 with its dependent claims 127-130 have been added.

One major concept of the present invention concerns inserting into an intervertebral space an implant of the type having opposed end plates, referred to herein as upper and lower parts, with an insert, component or the like between these upper and lower parts. Specifically, in accordance with this concept of the present invention, in both method and device form, an instrument is utilized for first inserting the end plates, or upper and lower parts, spreading them apart and then utilizing an instrument such as a pusher which cooperates with the first said instrument and which is guided thereby for inserting the insert between the separated upper and lower parts.

New independent claims 119 and 126 more clearly bring out these inventive concepts. Previous independent claims 26, 54, 59, 63, 68, 75, 78, 81, 85, 89 and 92 also bring out different features of this inventive concept. All 13 of these independent claims as well as their dependent claims are clearly patentable over all of the references of record, taken alone or in any combination.

Another inventive concept of the present invention is a medical device installation tool comprising a pair of opposed levers, a fulcrum, a pusher block and a pusher rod as set forth in independent claims 96, 104, 109 and 113. These claims were improperly rejected as anticipated by the Morrison U.S. Patent No. 3,486,505. In fact, these claims have already been allowed by the U.S. Patent and Trademark Office and issued as a

patent, namely U.S. Patent No. 6,478,800, wherein in fact the Morrison patent is of record. Of course the claims were erroneously issued to the wrong applicant since the present application has an earlier effective date and the '800 patent is not a reference against the present application. Thus, having rendered a decision that claims essentially identical to claim 96, 104, 109 and 113 are patentable over the prior art, including consideration of the Morrison patent, it is inappropriate and improper for the Office to totally reverse itself and reject claims which it has already allowed.

Turning now to the first described concept, and noting the 13 independent claims directed thereto, it is clear that none of the references of record, taken alone or in combination, anticipate these claims or render them obvious.

Of all the references considered by the Examiner, only one, namely the Keller U.S. Patent No. 4,997,432 relates to the concept of first inserting end plates and then subsequently separating them and inserting a component between them. However, in Keller, after instruments insert the end plates, the insert is inserted by hand. See column 2, lines 50 and 51, wherein it is noted that after the end plates have been spread, "the hands of the operating surgeon are free to insert the sliding core". In marked contrast thereto, in both independent claim 119 and 126, there is first stated an instrument for inserting the end plates after which the claims recite the element or step of another instrument to insert the insert between them, which other instrument, i.e., a pusher or the like, is guided by and thus moves in operative engagement with the instrument which inserts the upper and lower parts. This is totally different from Keller which uses no separate instrument for inserting the insert, which cooperates with the

first said instrument. Thus, these claims are clearly patentable over Keller under § 102 or § 103.

No other applied reference is sufficiently relevant to close the considerable gap between Keller and the inventions of claims 119 and 126 so as to render these claims obvious.

The Morrison U.S. Patent No. 3,486,505 in no way relates to or suggests anything whatsoever with respect to an instrument for inserting upper and lower parts, much less a pusher for inserting a component into place between spread apart upper and lower parts. Morrison shows nothing more than a one piece sliding block being pushed between upper and lower plates into the space between adjacent vertebrae, wherein it engages the adjacent vertebrae directly, not through upper and lower parts.

In Gau, the upper and lower parts 52 and 51 are preassembled with the insert 50 prior to insertion into the intervertebral space, wherein all three elements are inserted as a unit. Clearly, there is no suggestion whatsoever of any device or apparatus which first engages and moves the upper and lower parts, much less any structure or method for separating them apart and subsequently moving an insert into the space between them.

The Bertagnoli U.S. Patent No. 5,571,109 discloses insertion through the grooves of an instrument of a one piece implant similar to the one piece implant shown in Morrison. There is no suggestion whatsoever of any structure or method for inserting upper and lower parts followed by methods or instruments for inserting an insert between them.

The Shapiro reference was cited for an isolated feature but is not in any way actually relevant to the main features of the present invention and contains no suggestions of the features of the present invention which are missing from Keller.

All of the remaining previous independent claims 26, 54, 59, 63, 68, 75, 78, 81, 85, 89 and 92 include at least the features of the above discussed claims 119 and 126, plus additional features. Thus, these claims are believed to be patentable at least for the reasons discussed above with respect to claims 119 and 126, but also in addition because of the additional elements recited therein.

All of the dependent claims not specifically discussed above are believed to be allowable for the same reasons as their parent claims and also because they recite features which, taken together with the features of their parent claims, are directed to new, distinct and patentable combinations.

The claims have been amended, as necessary, to satisfy all rejections under 35 U.S.C. § 112.

In view of the above, it is respectfully submitted that this application is now in condition for allowance, which action is promptly and respectfully solicited.

END REMARKS